Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Andreas C. Rockas, Counsel, Legal Division
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Date: January 5, 2006

Subject: Adoption of Proposed Regulation 18361.10 – Designation of Certain Adjudicated Decisions as Precedent

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I. EXECUTIVE SUMMARY

As stated in our prior analysis at the pre-notice hearing, the Commission prosecutes many violations of the Political Reform Act ("Act")[1] through administrative hearings, i.e., "mini-trials." Nearly all such administrative hearings are delegated by the Commission to be carried out by administrative law judges ("ALJ's") outside the agency at the Office of Administrative Hearings. These ALJ's typically preside over hearings involving a wide variety of substantive law that does not involve the provisions of the Act. The Enforcement Division reports that at times an ALJ's unfamiliarity with the Act leads to inconsistent results and, therefore, a lack of predictability regarding how the Act will be applied in any particular case. The Legal Division, therefore, formulated this regulatory proposal for consideration by the Commission. To develop a better understanding of the issues, Commission staff held an interested persons' meeting on the subject on August 10, 2005, and presented a proposed form of the regulation at a pre-notice hearing on November 3, 2005. Based on public comments and input from both staff and the Commissioners, staff proposes the following version of regulation 18361.10 for adoption.

The proposed regulation would set out guidelines and procedures through which the Commission might increase the consistency, predictability and uniformity of its adjudicated decisions by facilitating the creation of a body of "case law." Specifically, in accordance with the provisions of section 11425.60 and related statutes in the Administrative Procedure Act ("APA")[2], the proposal would provide the Commission with a framework through which it could deem all or parts of certain administrative

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[1] Government Code §§ 81000 – 91014. Commission regulations appear at title 2, §§ 18109 – 18997 of the California Code of Regulations. All further references to statutory "sections" will be to the Government Code, and all further references to "regulations" will be to title 2 of the California Code of Regulations, unless otherwise indicated.

[2] Government Code §§ 11340 – 11529; see § 11370 (defining what shall be cited as the "Administrative Procedure Act").

enforcement decisions as having precedential value. Such precedent could be cited as binding authority in arguments made to ALJ's, and as persuasive authority to both state and federal judges, interpreting the statutes and regulations comprising the Act in future proceedings.

At the November 3, 2005, pre-notice hearing of this regulation, the Commissioners indicated their desire to create a process of designating or overruling precedent that would allow for input from both parties and non-parties. Such input from non-parties would be submitted in a public setting through a process similar to the opinion process (described in regs. 18320 et seq.).

Because the Commission does not appear inclined toward any process which would designate precedent without the input of the public, the following memorandum deals more with describing and analyzing the mechanics of a potential process for designating precedent. Specifically, this memorandum will focus on issues including:

- Whether default judgments should be considered for designation as precedent;
- Whether the Commission should consider designating all or part of past ALJ decisions as precedent;
- Whether the Commission should consider issuing a tentative decision regarding precedent prior to inviting comment by non-parties; and
- Whether the Executive Director (who under the current suggested scheme would screen out meritless non-party requests before presentation to the Commission) should provide the Commissioners with copies of such denials.

Staff recommends adoption of the proposed regulation at its January 2006 meeting. Recommendations regarding decision points will be discussed at the end of this analysis.

II. BACKGROUND

A. Brief Overview Of The Commission's Administrative Enforcement Procedures

When the Commission determines that there is probable cause that the Act has been violated, it may hold an administrative hearing to determine if a violation has occurred. (Section 83116.) Such hearings – the conduct of which is almost always delegated to ALJ's at the Office of Administrative Hearings – are conducted in accordance with Chapter 5 of the APA.[3] Once a proposed decision is rendered by an ALJ, the Commission may either adopt it, reduce the proposed penalty, make a clarifying change to it, or reject the proposed decision altogether and try the case itself. (Section 11517(c); see sections 83116, 83116.3, 83116.5 and regs. 18361.5 & 18361.9.) The

[3] Government Code §§ 11500 – 11529 (Chapter 5 is entitled "Administrative Adjudication: Formal Hearing").

maximum penalty the Commission can levy through administrative procedure is $5,000 per violation. (Section 83116(c).)

Enforcement proceedings by themselves do not result in policy statements or interpretations by the Commission that have precedential value. Currently, and since its inception, the Commission has directly voted upon statements of policy and interpretation regarding the Act through two basic methods: rulemaking and the issuance of opinions. (See sections 83112 and 83114(a), respectively, and regs. 18312 & 18320 et seq.) However, since at least 1997, the Commission has possessed but never exercised its power to speak through a third method – by designating certain of its adjudicated decisions as precedent. (See section 11425.60 [operative July 1, 1997].)

It is believed that through the creation of a body of "case law," as contemplated by section 11425.60, the Commission would be able to formalize and record its interpretation of parts of the Act that are awkwardly and/or rarely dealt with through regulations (which lack factual context) or the issuance of opinions (which deal only with prospective behavior). An ever-growing body of case law over time could thus increase the predictability of anticipated results and potentially lead to more pre-hearing settlements and thus, efficient use of resources. Of course, the care required to create and maintain a new, direct and consistent source of interpretive statements by the Commission would consume additional time and resources.

B. The Power of California Agencies to Make Precedent Under The Administrative Procedures Act

All state agencies, including the Commission, which adjudicate matters pursuant to the APA are authorized to designate certain of their decisions as having the value of precedent. (Sections 11425.10(a)(7) & 11425.60.) The term "decision" as used in section 11425.60 refers only to those decisions borne of an evidentiary hearing, i.e., an "adjudicated" decision. (Section 11410.10.)

The statute authorizing precedent designation is section 11425.60 (which was reprinted in full in our pre-notice analysis). That section states that an agency may designate as precedent "a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur." (Section 11425.60(b).) It also explicitly states that such a designation is "not rulemaking" and is not subject to judicial review. (*Ibid*.) The section also states that an agency shall maintain "an index of significant legal and policy determinations made in precedent decisions" and that it should be updated annually and made available to the public. (Section 11425.60(c).) Finally, the section also states that agencies are not precluded from designating and indexing decisions as precedent even though they were issued prior to the statute's effective date (July 1, 1997).

Further guidance as to the restrictions placed upon the Commission in designating precedent is found in the Law Revision Commission's 1995 comments regarding section 11425.60 (which was also reprinted in full in our pre-notice analysis). One pertinent

statement in those comments states that the section "is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis." (Cal. Law Revision Com. comments to section 11425.60, Deering's Ann. Gov. Code Ann. (2005 ed.).)

III. PROPOSED REGULATORY ACTION

The following is the proposed language and discussion of decision points for proposed regulation 18361.10. Where the pre-notice version consisted of six subdivisions, the current proposed version has eleven subdivisions. Substantively, subdivisions (a) through (d), and the last subdivision in both versions deal with the same basic topics. Subdivisions (e) through (j) of the current version are completely new.

The Ms. Jones Hypothetical*: To aid in the description of the various processes that are involved in the regulation as drafted, we will apply the following hypothetical and refer to it at times throughout the following analysis. To start, assume that a member of a city council in California, named Ms. Jones, was accused of violating three separate provisions of the Act: provisions A, B & C. Let's further assume that an ALJ's proposed decision was issued, finding her to have violated all three provisions. Finally, assume that the proposed ALJ decision regarding Ms. Jones is now set to be considered by the Commission at its regularly scheduled February 16, 2006, meeting.*

A. Subdivision (a) – Scope Of Regulation, Decision Points 1 & 2, And The Phrase "Any Person."

> **"§ 18361.10. Administratively Adjudicated Enforcement Decisions As Precedent.**
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> "(a) This regulation applies to administratively adjudicated enforcement decisions **{Decision Point 1}[**, not resulting from a default judgment,**]** pursuant to Government Code section 11425.60 **{Decision Point 2}[**, and which issue as proposed decisions after the adoption of this regulation**]**. The Commission may designate as a precedent decision part or all of a decision that contains a significant legal or policy determination of general application that is likely to recur. The Commission may also overrule its prior precedent designations. Such a designation or overruling thereof may be made upon the Commission's own motion, or at the request of any person."

1. Scope of Regulation and Decision Points 1 & 2.

As in the pre-notice version of this regulation, the first sentence explicitly limits the scope of the proposed regulation to "administratively adjudicated enforcement decisions" so as to preclude requests that, e.g., stipulated settlements be deemed precedent. The limitation to administratively adjudicated decisions is inherent in the

APA and necessarily excludes the use of stipulations as bases for precedent. (See section 11410.10.)

Decision Point 1 offers the possibility of further limiting precedent to those types of decisions not concluded through a default judgment.

In other words, if our hypothetical Ms. Jones lost her case before the ALJ simply because she failed to attend the hearing after being properly noticed, then the inclusion of Decision Point 1 language would preclude the Commission from designating the decision in Ms. Jones' case as precedent.

PROs: Though the Commission could simply limit its designation of precedent to non-default decisions in practice, and without the suggested language, Decision Point 1 allows the Commission to make its intent clear to the public in the regulation language.

CONs: The main policy reason for not including default decisions as precedent is because such decisions are not based upon a thorough vetting of the merits of a case through an adversarial process participated in by motivated parties.

Staff Recommendation: Staff recommends that the Commission adopt the language in Decision Point 1. Admittedly, such language would restrict the scope of decisions the Commission has a right to deem precedent. Nonetheless, staff believes that since default decisions are adjudged based upon the purely procedural failings of a party and infrequently issued, they are not a proper basis for precedent.

Decision Point 2 contains language that would limit the types of opinions which could be deemed precedent to only those "which issue as proposed decisions after the adoption of this regulation." Such a limitation, which is not legally required, could preclude the Commission from reaching back and designating any part of past decisions as precedent.

PROs: Reasons why the Commissioners might desire such limiting language:[4] First, such a limitation would limit precedent designation to actions where the parties and/or their attorneys are still identifiable and motivated to fully argue the merits of relevant facts and issues while fresh in their minds. Second, parties might argue, and the Commission might draft, future cases and opinions differently knowing that they could result in precedent decisions. Third, such a limitation would reduce the amount of resources the agency would have to apply towards reviewing several years of prior decisions, many of which might be based upon statutory and regulatory language that has

[4] When the federal judiciary recently wrestled with a similar issue, they voted not to designate past cases as precedent. In September 2005, the policy-making body of the federal judiciary, which makes recommendations regarding the handling of precedent in federal courts (the Federal Judicial Conference) endorsed proposed Rule 32.1, which would allow lawyers to cite to *any* opinion issued by a federal appellate court as precedent, whether published or not. After a great deal of debate among conference members, passage was finally eased by an amendment that would make the rule *prospective* only; in other words, lawyers would be unable to use unpublished opinions issued before January 1, 2007, as precedent. (Mauro, *Court Opinions No Longer Cites Unseen*, Legal Times (September 26, 2005).)

since changed and is therefore irrelevant. Fourth, the Commission may adopt future ALJ decisions with different considerations in mind, knowing that they could be deemed precedent.

CONs: Drawbacks for including such a limitation is that there could be, potentially, several decisions that have already been issued prior to the effective date of this proposed regulation that might provide an immediate and relevant source of guidance as precedent. In addition, just because the Commission did not include such a limitation in the regulation, does not mean it would be required to designate any past decisions as precedent; the Commission would simply be leaving itself an unexercised option to declare past decisions as precedent.

Staff Recommendation: Staff does not have a recommendation regarding Decision Point 2 since there are benefits and drawbacks of equal value.

Other Language In Subdivision (a). The second sentence explicitly sets out the mandatory standard an agency must satisfy before it designates precedent – i.e., that the decision under scrutiny "contains a significant legal or policy determination of general application that is likely to recur." Though the first sentence of the regulation refers to the statute (§ 11425.60), which states the mandatory standard for the designation of precedent, staff thought it would be more convenient for the reader to have the wording of the standard stated in the regulation itself, thus eliminating the need for the reader to refer to statutes outside the Act. Staff also added a third sentence to indicate that the Commission has the power to overrule its own precedent. The fourth and last sentence is discussed below.

2. The Phrase "Any Person."

As stated earlier in this memorandum, based upon comments made by several Commissioners during the pre-notice hearing on November 3, 2005, the currently suggested form of the regulation indicates that input regarding the designation of precedent shall be accepted from *any person*, not just the parties to a particular action before the Commission. Therefore, the last two words of subdivision (a) read "any person."

Allowing for input from the public regarding precedent raises some legal issues, particularly with the application of the Bagley-Keene Open Meeting Act (§§ 11120 – 11132.) As previously stated, the APA (in section 11425.60) explicitly states that the designation of precedent is "not rulemaking" and is not subject to the APA's rulemaking procedures which mandate the acceptance of public input before making a decision. Even so, Bagley-Keene applies to all state boards and commissions and generally requires those bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized by the Act to meet in closed session. Bagley-Keene generally requires that a "state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the

item." (Section 11125.7.) As you can see, this "open meeting" language is very broad and does not limit its application to rulemaking procedures only.

One exception to the general "open meeting" rule refers to the "deliberations" of a state body on decisions to be reached in a formal adjudicative hearing required to be conducted pursuant to Chapter 5 of the APA or similar provisions of law. (Section 11126(c)(3); see §§ 11500 et seq. [Chapter 5 of the APA]; see also 11125.7(e).) This does not mean that all portions of a formal adjudicative hearing may be held in closed session.[5] Therefore, a particular decision by the Commission may only be discussed in closed session, and without input from the public, if it: (1) is to be reached as part of a formal adjudicative hearing required to be conducted pursuant to Chapter 5 of the APA, and (2) is considered to be part of the "deliberation" portion of the adjudicative hearing process.

As discussed in the pre-notice memorandum concerning this regulation, the first requirement is met since section 83116 of the Act requires that such hearings be conducted pursuant to Chapter 5 of the APA.[6] Determining whether the second requirement is met is more difficult since staff has uncovered no direct authority stating whether a state agency's decision – about whether an adjudicated decision should be deemed precedent – is considered part of the "deliberation" exception to the open meeting presumption mandated by Bagley-Keene.

Because there is no authority directly on point either way, how the designation of precedent is discussed among the Commissioners (i.e., in open or closed session) becomes a policy question. A suggested procedure for handling this issue is further explored in the section regarding Decision Point 3, below, where it is asserted that the legally conservative approach is to hold all precedent discussions in open session. The Commissioners' decision regarding this issue may affect what type of process they want to incorporate into later sections of the proposed regulation. (See subsequent language in subdivisions (d) through (i).)

B. Subdivision (b) – The Indexing Of Precedent

> "(b) The Commission shall maintain an index of significant legal and policy determinations contained in precedent decisions.
> "(1) The index shall be updated at least annually, unless no new precedent decisions were designated or overruled that year.

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[5] The court has stated that "although state administrative agencies subject to the Administrative Procedure Act are required to conduct their 'adjudicative proceedings' openly (Gov. Code, § 11120, 11425.10, subd. (a)(3), 11425.20, 54950), the agency may conduct its deliberations in private (*id*., § 11126, subd. (c)(3)**;** and see Cal. Law. Revision Com. comments, 32C West's Ann. Gov. Code, § 11425.20 (1998 pocket supp.) p. 94)." (*The Recorder v. Comm. On Judicial Performance* (1999) 72 Cal.App.4th 258, 281 fn. 22.)

[6] Though the section authorizing the designation of precedent (§ 11425.60) is contained in Chapter 4.5 of the APA and not Chapter 5, it still meets the first requirement since Chapter 4.5 explicitly applies to adjudicative proceedings conducted under Chapter 5. (See section 11501(c).)

"(2) The index shall be made available to the public by subscription and on its website.

"(3) The availability of the index shall be publicized annually in the California Regulatory Notice Register."

The language here has not changed from the pre-notice version of the regulation. This subdivision consists of language that is largely contained in section 111425.60 and, therefore, is mandatory. We have added the suggested language, "and on its website."

Note that the index to be maintained is not necessarily of the entire text of the decisions issued by the Commission. Instead, the requirement is that the index reflect only, or at least, "significant legal and policy determinations contained in precedent decisions." The benefit of the index is that it permits the Commission if it wishes, or the staff as instructed by the Commission, to summarize the significant legal and policy determinations contained in a particular decision.

For example, if the Commission decided that a decision regarding our hypothetical Ms. Jones was legally significant only with regard to its decision on Counts A & B, the Commission could choose to make only the portions of the decision discussing those counts precedent. The Commission could do so by simply reprinting the designated words of the decision regarding Counts A & B into the index verbatim, or provide a summary or narrative regarding the legally significant determinations. On the other hand, if it found its rulings regarding the entire decision legally significant, it could designate the entire case as precedent (again, either verbatim or through narrative).

C. Subdivision (c) – Permissive Factors To Consider

"(c) In determining whether all or part of a decision should be designated or overruled as a precedent decision, the Commission may consider whether the decision:

"(1) Addresses a legal or factual issue of general public interest;

"(2) Resolves a conflict in the law;

"(3) Provides an overview of existing law or policy;

"(4) Clarifies existing law or policy;

"(5) Establishes a new rule of law or policy; or

"(6) Would be more appropriately addressed by regulatory amendment, the advice process, or the opinion process."

The language here has not changed from the pre-notice version of the regulation. This subdivision sets out a list of suggested factors for the Commission to consider in deciding whether to designate or overrule precedent. These factors are not made mandatory by section 11425.60. Such a list of factors and/or procedural guidelines could aid the Commission in deciding which, if any, of their adjudicated decisions should be deemed precedent in order to aid future ALJ's (and judges) in interpreting and implementing the statutes and regulations comprising the Act. (See Cal. Rules of Court, rule 976(b) [factors state appellate courts use to determine whether an opinion should be

published].) The last factor is an expanded expression of language contained in the Law Revision Commission's 1995 comments, indicating that agencies should endeavor to issue policy and express interpretation through the rulemaking process if possible.

D. Subdivisions (d) through (i) – The Parties Versus Non-Parties Process

These subdivisions set out a suggested order or process through which interested persons may present arguments for evaluation regarding the designation or overruling of precedent. As stated earlier, the Commissioners indicated at the pre-notice hearing in November 2005, a desire to entertain input from both parties *and non-parties* regarding the designation of precedent. Based upon that desire, we present the following suggested options for the Commissioners' consideration.

1. Subdivision (d) – Decision Point 3: Tentative Ruling System vs. Undefined System, And The Parties' Ability To Address The Issue Of Precedent Before The Commission Entertains Written Input From Non-Parties.

> "(d) **{Decision Point 3} {3A} [**At the Commission's meeting at which a proposed decision is considered for adoption on the merits, the Commission may make a tentative ruling regarding whether all or part of the proposed decision should be deemed precedent, and whether all or part of a previous related precedent should be overruled. In their briefs on the merits of a proposed decision, the parties to the action may include argument regarding precedent and overruling. A tentative ruling regarding precedent or overruling shall be considered for adoption at a Commission meeting subsequent to when a proposed decision on the merits becomes final. A tentative ruling regarding precedent or overruling is not final and shall have no precedential effect unless or until it is separately adopted.**] {3B} [**The Commission may decide whether to designate as precedent, or overrule, all or part of a decision at any Commission meeting held after the decision becomes final.**]** For purposes of this regulation, and with reference to 2 Cal. Code Regs. section 18361.9(c), a decision becomes 'final' when the Commission has made a decision on the merits and, either the time to file a petition for reconsideration has expired, or a petition for reconsideration has been granted and the reconsideration process has concluded."

Decision Point 3A. Version 3A proposes a "tentative ruling" system regarding the designation of precedent; the language designated in 3B is materially the same as the less-detailed language contained in the pre-notice version of this same subdivision.

After a majority of the Commissioners expressed the opinion that they would like non-parties to be allowed to submit written argument regarding precedent designation, other issues surfaced as to how and when argument could be submitted by parties and non-parties. A tentative ruling system (one version of

which is contained in Decision Point 3A) was then suggested by the Chairman after the pre-notice hearing.

Under this system, the Commission would make decisions regarding the parties only, and what portions of that decision (if any) might be deemed precedent, at the same meeting. (Note: Whether that single meeting is entirely conducted in closed session or not is discussed below, but not in the proposed regulatory language itself.) In their briefs on the merits of a proposed decision, the parties would be allowed to include argument regarding precedent. The Commission would then, after adjudging the facts of the case before them, discuss and issue a tentative ruling only with regard to precedent. (Note: It is contemplated by Enforcement that the Commissioners' discussion regarding a tentative ruling on precedent would be conducted in closed session.) That tentative ruling would only have precedential effect if, and not until, a subsequent meeting was held by the Commission adopting the tentative ruling on precedent.

In other words, our hypothetical Ms. Jones could submit a brief arguing both why she should not be found guilty of Counts A through C, and also argue why – if the Commission ruled in her favor – the arguments that support her should be deemed precedent for future cases. This system would also allow the Commissioners to formulate a "tentative" decision regarding what, if any, part(s) of the written decision on the merits of Ms. Jones' enforcement action they would like deemed as precedent before entertaining the precedent arguments of public persons having nothing to do with Ms. Jones or the facts of her case.

It should also be noted that under the system as currently drafted, the Commission could issue a tentative decision which would never go into effect as a final decision on precedent if no member of the public submitted a written request regarding the tentative and the Commission never acted upon the tentative at a future meeting. (Compare with the timeline set out in subdivision (i) below.)

PROs & CONs: The tentative ruling system is designed in a way to allow the parties to address the designation of precedent in conjunction with their arguments on the merits during an adjudicative proceeding. As the merits and facts of a case are integral to the issue of designating precedent, the tentative ruling system would provide the Commission an optimum contemporaneous opportunity to fashion a tentative decision regarding precedent while also considering the specific legal, factual and public policy issues raised by the parties.

Note that the issue of whether a tentative decision regarding precedent would be discussed along with the merits of a particular case in closed session, though not addressed in the regulation language itself, is an important issue for the Commission to decide. Staff's review of some other agencies' methods of designating precedent, though not exhaustive, reveals that their consideration of the merits and decisions regarding precedent are not always conducted separately. Staff is not aware of any state agency that considers the designation of precedent

solely in open session; on the other hand, other agencies do not necessarily issue policy directives through regulations, opinion letters and judicial opinions. As previously discussed (see discussion regarding "Any Person" on pages 6 & 7 earlier in this memorandum), whether a state board's discussion regarding the designation of precedent may be done in closed session as part of the "deliberation" exception to the Bagley-Keene Open Meeting Act is an open question, i.e., not addressed in existing case law. Therefore, there is no authority precluding the Commission from considering a tentative ruling as part of a closed-session discussion regarding the merits of the case.

Staff Recommendation: Enforcement Division supports the tentative ruling system. Legal Division's position is neutral. With regard to closed session discussions regarding precedent, the legally conservative approach would be to hold all discussions regarding precedent in open session. However, this is a policy decision for the Commission.

Definition of "final" decision. In response to the Commissioners' request for clarification, the current version of the last sentence of subdivision (d) contains added language, which is meant to clarify when a decision on the merits is "final." The calculation of that point in time triggers time lines in the rest of the regulation regarding how non-party requests regarding precedent designation shall be handled.

In the hypothetical Ms. Jones case, if: (1) the Commission considered arguments and made a ruling regarding the merits of her case at the February 16, 2006, meeting, and (2) that decision was served on the day of the decision, and (3) neither Ms. Jones nor the Enforcement Division filed a petition of reconsideration by March 3, 2006 (see 15-day rule in reg. 18361.9(c)), the merits of the case regarding Ms. Jones – without regard to any tentative ruling the Commission may have made regarding precedent – would be deemed "final" on March 3. On the other hand, if Ms. Jones filed a petition for reconsideration on or before March 3, the Commission's decision regarding the merits of her case would not be deemed final until the reconsideration process had concluded.

2. Subdivisions (e) & (f) – Timelines for Submission of Non-Party Requests for Precedent Designation and the Factors by Which They Will Be Screened by the Executive Director.

> "(e) After a decision on the merits is final, any person may submit a request, in the form of a concise written brief stating the reasons for the request and pursuant to this regulation, that all or part of such a decision be deemed precedent, and that all or part of a previous related precedent be overruled. Any such request shall be delivered to the Executive Director no later than 30 days after a decision on the merits is final. Within 14 days after a request is submitted, the person making the request shall be notified in writing of the Executive Director's decision to either grant or deny the request.

"(f) The grant or denial of a request by the Executive Director shall be based upon one or more of the following criteria:

(1) The timeliness of the request;

(2) Whether the request is vague, ambiguous or unintelligible; and

(3) The factors contained in subdivisions (c)(1) through (c)(6)."

Based upon changes made to the pre-notice language of subdivision (d), the language in these subdivisions has been changed as well. After a decision on the merits is "final," as defined in the last sentence of subdivision (d), the Commission will then (through its Executive Director) entertain input regarding precedent designation from the public. Some type of "screening" process (which in the current version utilizes the Executive Director as the screen) was suggested by several Commissioners at the pre-notice hearing.

Therefore, in the hypothetical case of Ms. Jones, let's again assume that the Commission decided her case at its February 16, 2006, meeting, that it served its decision the same day, and that neither party filed a petition for reconsideration by March 3. Since her case would be deemed "final" on March 3 under subdivision (d), a non-party (let's call him Mr. Joe Public) would have until April 2 (30 days later) to deliver a written request to the Executive Director concerning what portion, if any, of the decision in FPPC v. Jones should be deemed precedent. (Note: This would also be the applicable timeline if Mr. Public wanted to submit a request that a prior precedent, sufficiently related to the scenario dealt with in Ms. Jones's case, be overruled in light of the Commission's tentative decision.) In addition, if Mr. Joe Public's request were delivered on April 2, the Executive Director would have until April 16 to notify Mr. Public as to whether his request was granted or denied pursuant to the factors contained in subdivision (f).

If no requests are received during the 30 days following the decision on the merits becoming final, the Commission will then be free (without regard to subdivisions (f) through (i)) to deem its tentative ruling concerning precedent, as its final ruling concerning precedent whenever (if ever) it so chooses.

3. Subdivisions (g), (h) & (i) – Timelines Regarding Non-Party Requests That Have Been Granted and Will Be Considered by the Commission.

"(g) If a request is granted, the Executive Director shall deliver copies of the request pursuant to subdivision (h) of this regulation. If the request is denied, the Executive Director shall **{Decision Point 4} [**provide the Commission with a copy of the denial,**]** state the reason for the denial and advise the requestor of the requestor's right to appeal the denial to the Commission. Any member of the Commission, or person who has submitted a request that was denied, may ask the Commission to review a denied request at the next meeting of the Commission following the issuance of a denial. If a majority of the Commission approves the granting of a request, the denial shall be rescinded, the requestor shall be notified in writing that the request is

granted, and the Executive Director shall deliver copies of the request pursuant to subdivision (h) of this regulation.

"(h) The Executive Director will deliver all granted requests to the Commissioners, the Chief of the Enforcement Division, and parties to the decision, within seven days of the request having been granted.

"(i) Within 60 days of delivery of a granted request by the Executive Director, the Commission shall decide which part or parts, if any, of the final decision will be designated as precedent and what portions, if any, of previous precedent will be overruled."

These subdivisions explain how, if a non-party request for precedent designation is screened by the Executive Director (pursuant to the factors contained in subdivision (f)), the request will be processed and considered by the Commission.

Therefore, in the running hypothetical case of Ms. Jones, let's assume that Mr. Public's request (regarding the designation of FPPC v. Jones as precedent) was delivered on April 2 and that the Executive Director granted and delivered Mr. Public's request pursuant to subdivision (h) on April 16. In such a case, the Commission would have until June 15 (or 60 days) in which to decide which parts, if any, of the final decision in FPPC v. Jones would be designated as precedent. (Note: Since the next prior Commission meeting is currently scheduled for June 8, 2006, the Commission would probably wish to make a decision on June 8.)

Decision Point 4 in subdivision (g) is the outgrowth of a discussion held among the Commissioners at the pre-notice hearing. This decision point proposes language that would mandate notification of the Commission regarding all non-party requests denied by the Executive Director.

PROs: This would allow the Commissioners to be kept informed as to how the Executive Director is applying the screening process (in subdivisions (e) & (f)) and to alter the application of such a process if they so wished.

CONs: It adds time and expenditure of resources to the process of designating precedent.

Staff Recommendation: Neutral. Staff sees this as more of a policy question to be decided by the Commissioners.

Other Language. Subdivision (g) also provides a method through which non-parties may appeal the denial of a request.

Subdivision (h) prescribes how and when (one week) the Executive Director must deliver granted requests to the Commissioners, the Chief of Enforcement, and the parties to the action that triggered the request.

Subdivision (i) indicates that the Commission will have 60 days to decide what parts, if any, of the granted request will be honored. As previously noted, under the discussion regarding subdivision (d), the Commission could let a tentative decision stand forever without acting on it if it did not receive any public requests, and it would have no effect.

E. Subdivisions (j) & (k) – Commissioner Autonomy & General Protections

> "(j) Subdivisions (e) through (i) of this regulation shall not restrict individual Commissioners. A Commissioner may request that all or part of a final decision be deemed precedent, or that the Commission's designation of all or part of a final decision as precedent be overruled, by formal motion and approval by a majority of the Commission.
>
> "(k) The designation or overruling of all or part of a decision as precedent is not rulemaking. The Commission's designation of all or part of a decision, or the lack of such designation, as precedent is not subject to judicial review."

The language in subdivision (j) makes explicit that the Commissioners retain autonomy with regard to the designation or overruling of precedent and are not bound by the process specified for argument by all others. This language is very broad and contains no process, allowing any Commissioner to raise the issue of precedent for consideration without being encumbered by the processes delineated for parties and the public.

The language in subdivision (k) is taken from section 11425.60 and is reiterated here for the convenience of the reader.

IV. SUMMARY AND RECOMMENDATIONS

Staff recommends adoption of the proposed regulation at its January 2006 meeting. Staff recommends including the language of Decision Point 1. Staff is neutral with regard to Decision Points 2 and 4. Enforcement Division staff recommends version 3A [setting out a "tentative ruling" system]; the Legal Division staff's position is neutral.